Supreme Court, U. S.
FILED
JUN 28 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1614

HARPER SIBLEY, JR.,

Petitioner,

v.

TANDY CORPORATION, ET AL.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT TANDY'S BRIEF IN OPPOSITION

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Petitioner believes it will be most helpful to this Court to view the Petition for Writ of Certiorari ("Petition") and Respondent Tandy's Brief in Opposition ("Respondent's Brief") within the framework of what Petitioner submits are five fundamentally important questions of law subsumed within the two broad questions raised by the Petition and the decision below, and now crystallized by Respondent's joinder of issue.

1. Whether the Court of Appeals for the Fifth Circuit erred — and in so doing undermined the Wilko *doctrine*[1] *— in failing to recognize that the concededly non-arbitrable "fraud facts" are one and the same as the "contract facts" and the "conversion facts"?*

Petitioner, the Court of Appeals for the Fifth Circuit, and, apparently, Respondent all agree that the appropriate inquiry

[1] In *Wilko v. Swan*, 346 U.S. 4237 (1953), this Court ruled that claimed violations of the antifraud provisions of the federal securities laws could not be arbitrated, even when the parties had contractually agreed to arbitrate all disputes between them. *See* Petition, p. 7, n. 3.

is whether an arbitrator must entertain the same facts as give rise to the non-arbitrable claims of fraud, and that if he must, arbitration must be denied. (See Petition, pp. 7-8; 543 F.2d 540, 543, n. 4, and accompanying text.) Petitioner contends that the decision below erred in failing to make that inquiry and in choosing instead to imply that the arbitrable and non-arbitrable claims in this case were "factually severable" at the time of the original complaint, 543 F.2d at 543. (The Court of Appeals did not make any findings directed to the severability of the facts and claims proven at trial.) The truth is that no amount of analysis, and no application of notions of "dependency," "legal intertwinement," and "somewhat intertwined and overlapping" will permit any tribunal — much less the parties — to attach different legal labels to the facts of this dispute. As demonstrated in the Petition (pp. 13-19), the fraud facts, the contract facts and the conversion facts in this case are all the same.

Respondent's Brief does not challenge this conclusion, but instead implicitly concedes that the arbitrator will now necessarily hear the same evidence as has given rise to jury findings of fraud, unless this petition is granted and the decision below reversed.

Because the "severability" test derives from *Wilko's* prohibition against arbitration of securities fraud claims, see, *e.g., Shapiro v. Jaslow*, 320 F. Supp. 598 (S.D.N.Y. 1970), the decision below conflicts with the spirit of that prohibition by ordering the parties to present to the arbitrator claims which will unavoidably include and be based upon evidence of fraud. (Petition, pp. 13-19) This Court's writ should issue to prevent this erosion of the *Wilko* rule.

2. *Whether trial court determinations of arbitrability should be reviewed for an abuse of discretion, or decided* de novo *by the appellate court?*

Until now, determinations of arbitrability were considered discretionary matters for the trial court (Petition, p. 8). The Fifth Circuit failed to find that the trial court abused its discretion in this case.[2] The absence of such a finding makes it obvious that the decision below stands for the propriety of *de novo* appellate determinations of arbitrability, even after a trial on the merits. (Petition, pp. 11-13) Petitioner submits that even if the Fifth Circuit had fashioned an understandable standard for making arbitrability determinations in the first instance — and the standard established here is impossibly obscure — its requirement of *de novo* determinations on appeal injects an unacceptable element of uncertainty into both the judicial system and the arbitration system, for it casts a terrible cloud over everything that happens following the trial court determination. (Petition, pp. 8-13, 19)

Respondent's answer to this contention is not to deny the almost impossible uncertainties created by a *de novo* standard, but to argue that the Second Circuit has previously approved such a procedure. (Respondent's Brief, p. 25, citing *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2d Cir. 1965)). The *Necchi* case involved an appeal on the question of arbitrability *before* either a court or an arbitrator

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[2] The Fifth Circuit did find that the trial court chose "a course 180 degrees off the correct one" (Opinion on Petition for Rehearing), thereby persuading Respondent to conclude that the decision below "amounts to one that the trial court abused her discretion." Respondent's Brief, p. 24) But of course any decision that must go one way or another — either you arbitrate or you don't — is "180 degrees off" if someone disagrees with it. And that is all the decision below reflects — a disagreement with the trial court's judgment. That is a far cry from a finding of abuse of discretion.

Because what is at stake on a motion to stay pending arbitration is the choice of forum, the trial court's decision is analagous to the one it makes on a venue motion under 28 U.S.C. § 1404(a). That decision is discretionary, and except for an abuse of discretion, "ordinarily the district court's ruling will not be disturbed on final appeal." 1 *Moore's Federal Practice*, ¶ 0.147, p. 1697-98.

had made any decision on the merits. One cannot quarrel with a *de novo* determination made at this juncture; but Respondent here made no effort to appeal, failing even to seek certification of the arbitrability question under 28 U.S.C. § 1292(b). In the absence of a required interlocutory appeal, *de novo* review makes no sense at all. If the trial court is to have no discretion on the arbitrability determination, then this Court should grant this writ to review the ancient distinction between interlocutory appealability of orders refusing to stay suits seeking any equitable relief (not appealable) and those seeking exclusively legal relief (appealable). (See Respondent's Brief, pp. 26-27) Particularly with *de novo* review, it is illogical to determine the interlocutory appealability of so fundamental an order on the basis of whether the pleadings included a prayer for equitable relief. This is especially so in view of Rule 54(c) of the Federal Rules of Procedure, which requires a court to award whatever relief the prevailing party is entitled to, whether or not his pleadings request it.[3]

Further, in *Necchi* the district court had failed to rule on the several questions of arbitrability, but instead had left them to the arbitrator; thus the Second Circuit, in a commendable effort "to expedite this litigation," 348 F.2d at 697, decided the arbitrability of the items in dispute. That decision had exactly the opposite effect of the decision below, which not only fails to tell the parties and the arbitrator what facts have been deemed arbitrable "non-fraud"

[3] Of equally basic importance is the question of whether a party seeking to stay litigation should be required to request certification of the arbitrability question for interlocutory appeal under 28 U.S.C. § 1292(b). In the absence of such a requirement, there is a great disincentive to do the sensible and economical thing: take the arbitrability question up before the parties and the courts have wasted their resources and time on a trial which can be mooted if an appellate court views the arbitrable and non-arbitrable facts and issues as only "somewhat intertwined" instead of "legally intertwined."

facts, but also immeasurably delays the ultimate resolution of this controversy.

Petitioner therefore submits that neither *Necchi* nor any other case sanctions the resort to *de novo* appellate determinations of arbitrability *after* a resolution on the merits (whether by a court or an arbitrator). The decision below conflicts with the cases establishing the proposition that the arbitrability determination is discretionary and with those confirming the discretionary nature of trial court determinations of venue motions. (See note 2, *supra*). These conflicts virtually ensure enormous waste and delay.

Because this issue is so important, and has never before been decided by this Court, a writ of certiorari should issue to review and reverse the decision below, and to establish an abuse of discretion standard for review of trial court arbitrability determinations.

3. Whether the precedent established by the decision below — arbitration of fully litigated claims after de novo *review of the question of arbitrability — will produce waste and delay, in this case and cases to follow, thereby defeating the aims of the Federal Arbitration Act?*

Petitioner contends that one of the most fundamental errors of the decision below, and its greatest irony, lies in the unavoidable waste and delay effected by its holding — in this case and in those to follow. (See Petition, p. 19) Insensitive to the views of this Court[4] (as well as those of Congress[5]) as to the principal aims of arbitration — speed and economy — the decision below requires an arbitrator to hear facts on which a jury verdict of fraud has been handed down, and may ultimately force Petitioner to prove three

[4] *Wilko v. Swan*, 346 U.S. at 431-32, 438.
[5] See *Wilko v. Swan*, 346 U.S. at 432, n. 12 and accompanying text.

times that Respondent's claim to the escrowed stock was and is knowingly false.

Respondent's answer to this plainly inappropriate specter of things to come is not to defend it, but to claim that the Fifth Circuit has previously sanctioned it in another case. Respondent argues that *General Guaranty Insurance Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970), holds that it is appropriate to order arbitration of issues "already once judicially litigated." (Respondent's Brief, pp. 28-29) That case holds just the opposite. The court of appeals there held that questions decided by the trial court should not be sent to arbitration, but should be deemed "finally determined for all parties and for all purposes," 427 F.2d at 930. Only questions not yet passed on by a court could properly be sent to arbitration. *Id.* Thus what we have, in a case viewed by Respondent as controlling, is a holding squarely in favor of Petitioner: there is no reason to order duplicative arbitration of issues already decided by a court. In fact, the case at bar is the only one Petitioner has found which orders arbitration of fully-litigated issues — or vice-versa.

This Court should issue its writ to protect against judicial defeat of the aims of arbitration, and to insure a sensible administration of our overall system of dispute-resolution: the courts should not be run in such a way as to foster redundant proceedings.

4. Whether the test for determining arbitrability established by the decision below is either understandable or capable of being applied?

The arbitrability test established by the decision below is as follows: a dispute must be deemed wholly non-arbitrable if the arbitrable and non-arbitrable issues are "intertwined

in the legal sense" (543 F.2d at 543), but partly arbitrable if those issues are "[only] to some degree intertwined and overlapping" or "dependent" (543 F.2d at 543-544). (Petition, p. 8) Petitioner contends that test is nonsensical. (Petition, pp. 8-11)

Respondent's answer to this contention is to assert that there is a difference between saying what the Fifth Circuit said — that in the instant case, "unquestionably, the *facts* are to some degree intertwined and overlapping" — and saying what Petitioner said about the Fifth Circuit's test — that the *issues* are somewhat intertwined and overlapping. (Respondent's Brief, p. 19) That difference is so semantic it is specious. Facts create issues; hence it is a truism that the issues are intertwined and overlapping if the facts are. Thus the Fifth Circuit was saying — really quite clearly — that even though the arbitrable and non-arbitrable facts and issues in this case are "unquestionably to some degree intertwined and overlapping," 543 F.2d at 544, arbitration is nonetheless necessary, because the facts and issues defined by the superseded original complaint were not "legally intertwined."

This Court has never decided the appropriate test of arbitrability where both arbitrable and non-arbitrable claims are made. A practical, understandable test is of vital importance to our system of justice. The test emanating from the decision below is neither. This Court's writ should issue to restore reason to this area of the law.

5. Whether the decision below erred in deciding the question of arbitrability on the basis of a superseded pleading?

On the basis of "the claims made in the original complaint," the Court of Appeals decided to send this case to arbitration

despite a full judicial resolution of the controversy. 543 F.2d at 543. (Petition, p. 22, n. 12) Petitioner has shown that as a result of discovery, the original complaint was amended to delete the several words on which the Court of Appeals grounded its decision and its "dependency" notion — so that the case was tried on the basis of an *independent* fraud claim, which the jury sustained. (*Id.*) Petitioner contends that this failure to decide the case on the basis of the entire record — which explains the appellate court's failure to comprehend that the fraud facts in this case are the same as the contract and conversion facts (see Petition, pp. 13-19) — is error so fundamental as to deprive him of a right vouchsafed by Section 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a), and by this Court's *Wilko* decision: the right to enjoy the fruits of a trial of claimed and proven violations of the federal securities laws.

Respondent's argument — that it was appropriate for the Fifth Circuit to decide the case on the basis of the superseded original complaint because "that was the only pleading of Petitioner before the trial court when it ruled on the Motion to Stay" (Respondent's Brief, p. 16, n. 12) — ignores the conflict between the decision below and those many cases holding that an amended pleading supersedes a prior one, thus preventing the prior pleading from being used like the Court of Appeals used it here — as a legal admission. (See Petition, p. 22, n. 12)

The trial judge's denial of arbitration was proven by discovery and by the actual trial itself to be completely correct. That initial determination — that the facts creating the arbitrable and non-arbitrable claims in this case are intertwined — is no longer challenged by Respondent, which has made not one single effort to dispute this contention, as

outlined on pages 13-19 of the Petition. It is sophistry to ignore the impact of subsequent discovery, pleading amendments and proof upon the trial court's arbitrability determination.

The effect of this failure to examine the entire record in deciding arbitrability is to undermine the *Wilko* rule by depriving Petitioner of the fruits of the trial mandated by *Wilko*. It is also to ignore what this Court has observed are the serious shortcomings of arbitration — including discovery limitations which might well have prevented Petitioner from uncovering the facts which led to his amended complaint (see Petition, p. 21) and successful trial of his fraud claims. See *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 57-58 (1974).

This Court should grant the Petition, to resolve the conflict between the decision below and the cases holding that an amended pleading is the controlling one on appeal, and to prevent further encroachment on the *Wilko* rule.

CONCLUSION

Petitioner submits that this controversy has generated a number of fundamentally important questions of law, some of which are significant because they present conflicts between the decision below and the decisions of other circuits (see, *e.g.*, items 2 and 5, *supra*), others of which are important because they conflict with the spirit of this Court's decision in *Wilko v. Swan* (see, *e.g.*, items 1 and 5), and still others which are critical simply because of their profound impact upon the administration of justice (see, *e.g.*, items 2, 3 and 4). Petitioner requests this Court to issue a writ of certiorari to review the judgment and opinions of the

Fifth Circuit Court of Appeals, and establish appropriate standards and procedures for determining and reviewing questions of arbitrability.

Respectfully submitted,

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I, Marvin S. Sloman, counsel for Harper Sibley, Jr., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on June ..., 1977, I served three copies of the foregoing Reply to Respondent Tandy's Brief in Opposition by mailing same by United States mail, postage prepaid to Cecil E. Munn at his office at 1800 First National Building, Fort Worth, Texas 76102, counsel of record for Respondent.